

Appendix E. Letters of Comment Received on the DEIS.

Comments on PROGRAMATIC ENVIRONMENTAL IMPACT STATEMENT for Pacific Coast Groundfish Bycatch Management

Submitted March 26, 2004

Introduction

This EIS has two important shortcomings. The first shortcoming is a failure to consider an important alternative. The second relates to the complete lack of quantitative rigor in evaluating alternatives.

Shortcoming One: Failure to consider all reasonable alternatives.

NEPA Regulations, 40 CRF 1502.14(a) states:

Agencies shall rigorously evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

There is one alternative that is conspicuously absent from this EIS and no reasons are offered as to why. That is, the option of completely phasing out bottom trawling throughout the entire region --- not just in reserves or protected areas.

The benefits of this alternative are clear. According to a recent report sponsored by the Pew Charitable Trusts [1], bottom trawling is clearly the worst widely practiced fishing method in terms of finfish bycatch, impacts on the physical structure of the seafloor, and impact on seafloor organisms. It is arguably the least "specific" of the fishing gear types.

Quoting the Pew-sponsored report, "fishing gears that contact the seafloor disturb geologic and biological structures. These gears plane off structures on soft areas of the ocean bottom, displace boulders, and harm bottom-dwelling organisms by crushing them, burying them, or exposing them to predators. The benthic animals most sensitive to fishing gears [that contact the bottom] are those that are erect and fragile, long-lived and slow-growing, or living in waters where severe natural disturbances are less common, particularly below a depth of 350 feet."

NOAA should use the best available bycatch model to estimate how much eliminating bottom trawling would reduce total bycatch and compare it to the other alternatives. The fact that bycatch estimates are uncertain is no excuse for not using quantitative models to compare options. The uncertainties can be expressed as ranges and/or probability distributions.

Eliminating bottom trawling would have costs. It would temporarily reduce the profit earned by bottom trawling fishers. It would reduce the supply of certain commercial fish species. Over time these costs will be reduced as new, less harmful fishing methods are deployed and alternative fish supplies are substituted. Economic impacts could be mitigated by phasing out bottom trawling over a 5 or 10 year time frame.

The market impacts of curtailing bottom trawling may be relatively modest if they are examined carefully. According to the Pew-sponsored report, bottom trawling accounts for only about 10 percent of the revenue from fish landings in the Pacific Region. The highest value class of the species caught in bottom trawling is ocean shrimp. It is hard to

believe that the consumer would be seriously hurt by one less shrimp option available at the market.

NOAA should also examine explicitly the profit associated with bottom trawling. Fishing revenues are indicators but they are not the ultimate measure of economic benefit. Economic benefits for fishers and for society in general should be evaluated based on profit, where profit equals revenue minus costs. Measuring impacts in terms of revenue alone is misleading. Businesses exist to maximize profit, not revenue. If NOAA examined profit, we might see that bottom trawl fishing this a very destructive but only marginally profitable enterprise.

Along with evaluating the elimination of bottom trawling, NOAA should evaluate the productivity of simultaneous investments in research and development on alternative, less harmful, bottom fishing technology. Development of traps should be high on NOAA's priority. Program costs and likely outcomes of the research should be a part of this EIS.

So why is NOAA condoning or overlooking this destructive fishery? The answer isn't apparent in the EIS.

Shortcoming Two: Lack of quantitative support offered to compare and evaluate alternatives

NEPA Regulations 40 CFR 1502.14(b) states that

“agencies shall devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”

This objective is echoed on page 1-21 of the EIS where it says, "The Council and NMFS will consider how each alternative addresses the purpose and need for action. They will weigh the expected or potential benefits and costs of each alternative and decide which, if any, alternative, provides the optimal balance." It is hard to believe that this EIS document, as long as it is, will be much help in meeting this goal. Generally speaking, the evaluation is wordy and lacks analytical rigor.

The differences among the alternatives in this EIS would be much clearer if a more quantitative cost-benefit approach were taken. A quantitative approach would also have the benefit of helping the preparers of the EIS to be more clear and concise in their thinking and communication.

Many of the important outcomes of the alternatives are easily expressed in numbers, e.g., numbers and pounds of fish caught, fraction of bycatch, percent of bycatch mortality, area of bottom habitat disrupted, consumer prices, fishing revenues and costs, and implementation costs. For example, it would be useful to see a table of bycatch broken down by gear type. Granted, many of the impacts are uncertain. Non-the-less, uncertainties can effectively be quantified and communicated using ranges and probability distributions.

Without quantification, much of the ranking of alternatives and summaries of alternative effects creates more heat than light. Rankings like those in Tables 4.3.1-6, 4.5.2, 4.6.1 and 4.6.2 give us no idea of the magnitude of differences and are of little help in finding the "optimal balance." Likewise, "Significance Ratings" like those used in Tables 2.3.2, 2.3.3, 2.3.5 and 4.7.2 are needlessly abstract and lack objectivity. And, in general, the "Verbal Summaries" like Tables 2.3.4,

4.7.1 and 4.8 do little to highlight the significant differences between options. Decisions should be based on clear differences and concise insights. These tables offer completeness but little insight regarding the differences that are a basis for decision making.

Commercial fishing is a business. Universally accepted quantitative tools from management science should be used to support the bycatch mitigation decisions. Computer-based mathematical models and decision analysis are examples. They are used routinely to support decision making throughout the world in business and government [2,3]. They are grossly underutilized in this EIS.

Summary

Firstly, the EIS should explicitly consider and evaluate elimination of bottom trawling as an alternative. And secondly, the evaluation should have been much more quantitative.

In the words of Lord Kelvin (1824-1907), "When you can measure what you are speaking about and express it in numbers, you know something about it, but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meager and unsatisfactory kind; it may be the beginning of knowledge, but you have scarcely in your thoughts advanced to the state of science, whatever the matter may be." He also said, "If you cannot measure it, you can not improve it."

Your thoughtful consideration of my comments is appreciated. Thank you.

Stephen M. Barrager, Ph.D.
Researcher, Fisheries Policy Project
Environmental and Natural Resources Law and Policy Program
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

Email: barrager@stanford.edu

References:

[1] Morgan, L.E., Ratana Chuenpagdee, Shifting Gears: Addressing the Collateral Impacts of Fishing Methods in U.S. Waters. 2003, Pew Science Series on Conservation and the Environment.

[2] North, R.W., et al, The Decision to Seed Hurricanes, Science, Vol. 176, p.1191 -1202, 1972

[3] For a list of books on Decision Analysis, see www.informs.org/Bookstore/das

AUGUST FELANDO

Proctor in Admiralty
Attorney at Law

870 San Antonio Place
San Diego, CA. 92106
TEL: (619) 223-7654
FAX: (619) 223-7958

April 26, 2004

BY FAX AND MAIL

Mr. D. Robert Lohn
Regional Administration
Northwest Region, NMFS, NOAA
7600 Sand Point Way N. E., Bldg. 1
Seattle, WA 98115-0070

Comments on the Pacific Coast Groundfish Bycatch Draft Programmatic Environmental Impact Statement (DPEIS)

Dear Mr. Lohn:

On behalf of D'Amato Commercial Fishing and Kingfisher Trading Co., Inc., this is to offer comments on the DPEIS.

Background of D'Amato Commercial Fishing and Kingfisher Trading Co., Inc.

D'Amato Commercial Fishing ("D'Amato") is composed of four individuals who are members of the D'Amato family living in Orange County, California. Because of the economics of the live-fish fishery, these four individuals operate 18 permitted fishing vessels on a rotation arrangement. Only one person is aboard one permitted vessel at the time of fishing. Two members of the Family each operate 5 vessels, and the two remaining members each operate 4 vessels.¹ The maximum number of vessels fishing on any fishing day is 4 vessels. Economics of the fishery do not justify the operation of more than 4 vessels on any fishing day. The vessels are registered by the California Department of Motor Vehicles (DMV) because none are large enough to be documented by the U.S. Coast Guard. None of the vessels exceed 26 feet in length. They are taken to public operated shoreside ramps by trailers. The vessels and trailers are located at the homes of the individuals. These vessels are engaged in the live-fish fishery with limited entry fixed longline gear and without Sablefish endorsements.² The fishing vessels are operated in compliance with the newly established VMS rules. All four fishermen have been on fishing trips with NMFS Observers recording their fishing activity.

¹ Over a period of time, particularly in the last three years, D'Amato purchased permitted vessels as their live-fish fishery for Sablefish and Shortspine thornyhead developed. This was the only means available to them in the Groundfish FMP to attain their current efficient and profitable live-fish fishing operation.

² The DEIS notes that in recent years, the growth of the live-fish fishery but does not identify the number of vessels participating in such fishery or how many of these vessels operated south of 34° 27' N. Lat.; the DEIS states that during any given year that of 230 permits issued, only about 180 vessels coastwise are active. On the basis of this information, D'Amato operates 10% of this active fleet. "Holders of permits that are not sablefish-endorsed are not permitted to land amounts of sablefish in excess of daily/weekly trip limit provisions." See: Dr. James Hastie, PFMC Exhibit C.4.a. Attachment 2, April 2004, "Modeling Sablefish Discard and Bycatch of Overfished Species in the 2004 Limited-Entry Fixed Gear Sablefish Fishery." page 1.

Kingfisher Trading Co., Inc. ("Kingfisher"), buys live fish from D'Amato and then sells the live fish to restaurants located in the counties of Los Angeles and Orange County. D'Amato is a significant and very reliable supplier to Kingfisher of live Sablefish and Shortspine thornyhead. This proven reliability throughout the calendar that is characteristic of D'Amato is extremely important to Kingfisher in servicing and maintaining his customers, particularly with Asian operated restaurants.

Pursuant to federal Groundfish regulations, and in particular **Table 4 (South) , 2004 Trip Limits for Limited Entry Fixed Gear South of 40° 10' N. Latitude**, the D'Amato fishing vessels fish for Sablefish and Shortspine thornyhead. These are species of groundfish that permit their live retention after reaching the deck of the D'Amato vessels largely because of their unique biology.³

D'Amato describes its fishery as follows: "Limited Entry, fixed gear" used in depths beyond 250 fathoms, in waters off Southern California, south of 34° 12' N. Latitude and within the Rockfish Conservation Area (RCA). D'Amato lands live Sablefish and/or Shortspine thornyhead by using baited hooks attached to an longline stretched about the ocean floor that is secured with two anchors and two buoys. Herein, the term "D'Amato Fishery" refers to this description.

D'Amato Fishing Activity and Bycatch Reduction

NMFS Observers have fished with D'Amato, and it is the present recollection of D'Amato that the Observers recorded no bycatch-repeat-no bycatch-of the following eight overfished groundfish species: Bocaccio rockfish, Canary rockfish, Cowcod, Darkblotched rockfish, Lingcod, Pacific Ocean Perch, and Yelloweye rockfish, and Widow rockfish. D'Amato does recall the rare event of their gear incidentally catching a few individual Pacific Whiting.⁴ In making this claim concerning Pacific Whiting, D'Amato is confident of support from the records of the NMFS Observers.

D'Amato contends that a very negligible portion of their "**total catch**" of Sablefish and/or Shortspine thornyhead is thrown away at sea and that the entire live catch or "**landed catch**" is retained and brought ashore.⁵ The only reason for the very few discards of a targeted species is the discovery on the deck that the interior of fish was being "eaten away," giving rise to a description by the fishermen of "skeleton-like".⁶

We note the DEIS defines the term bycatch very broadly to "mean discarded catch of any living marine resource, plus any unobserved mortality resulting from a direct encounter with fishing gear."⁷ D'Amato fishes for Sablefish and Shortspine thornyhead in waters of 250 fathoms and greater; therefore, D'Amato believes that the only record of any other living marine resource reaching the decks of their vessels and referred to as an "incidental catch" would be a variety of sharks, such as "dogfish (pin-back sharks)", "sleeper" sharks" and an occasional

³ On rare occasions, D'Amato will land a live catch of Longspine thornyhead, but their choice targets are Sablefish and Shortspine thornyhead.

⁴ The paper of Dr. James Hastie, cited above, notes on p.5 a limit on Observer data collected from non-tier fishing for sablefish, that is, "the fishery conducted under daily/weekly options".

⁵ The terms "total catch", "incidental catch", and "landed catch" are defined in p.1-8, DEIS 2/15/04

⁶ See: p. 1-3, DEIS 2/15/04.

⁷ See: p. 1-6, DEIS 2/15/04

Dover sole.⁸ These sharks and the Dover sole are thrown back into the ocean alive. Again, in making this claim of a very low incidental catch, D'Amato is confident of support from the records of the NMFS Observers.

D'Amato contends that the fixed longline gear they use to catch Sablefish and Shortspine thornyhead does not produce a bycatch resulting from "GHOST FISHING" as that term is used in the DEIS. D'Amato does not believe that the use of this fixed or anchored longline gear should be identified with trawl gear causing a bycatch resulting from "the stress of capture and physiological injuries" as reported by the studies referred to in the DEIS concerning trawl gear. Should the D'Amato fail- none has occurred to date- to raise their longline gear which has its ends attached with buoys and anchors: the hooks used by D'Amato's are degradable and it is also reasonable to assume that hooks without bait do not catch fish on the ocean floor in depths greater than 250 fathoms. For these reasons, D'Amato contends that the possibility of "GHOST FISHING" in their fishery is very remote and unrealistic.

The DEIS notes that the term "fish" has a broader meaning for "most fishery managers" than commercial fishermen like D'Amato.⁹ Even using the sometime use of the "broader meaning", D'Amato contends that the reports of the NMFS Observers will support their contention that no marine mammals, and seabirds are caught incidentally in the D'Amato Fishery. Further, that in the D'Amato Fishery, the sharks, Pacific Whiting, and Dover sole were returned by D'Amato are returned to the ocean alive and well, and that the number of these incidents and the quantities involved are statistically insignificant.

For the above reasons, D'Amato questions the need for the proposed action as it applies to the D'Amato Fishery.

D'Amato and Kingfisher have accommodated to the current conservation and management measures as they apply to the D'Amato Fishery. The record shows that they accomplish "to the extent practicable (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch."¹⁰ The incidental bycatch experienced by D'Amato Fishery is already zero as it relates to eight of the nine overfished species. The incidental catch in the D'Amato Fishery of the overfished Pacific Whiting is statistically inconsequential as well as extremely rare; therefore, such bycatch mortality has been minimized "to the extent practicable. The reported unavoidable bycatch of sharks and dover sole in the D'Amato Fishery do not involve mortality. Therefore, the existing groundfish fishery management plan, and regulations promulgated to implement such plan is "consistent" with national standard 9 as applied to the D'Amato fishery.

If the D'Amato Fishery becomes subject to a combination of measures proposed in Alternatives 4, 5, and 6 as substitutes to the current conservation and management measures on the ground that they significantly reduce bycatch in other fisheries if not in the D'Amato fishery, then D'Amato will unfairly experience new operating costs and burdens that will not be offset by an increase in the quantity and value of Sablefish and Shortspine thornyhead landings, thereby causing D'Amato to seek other fisheries that are economically sustainable or terminate their fishing operation completely. Should D'Amato take either of these options, then Kingfisher

⁸ "Unlike most rockfish, sablefish do not have swim bladders that explode when the fish are retrieved rapidly from great depth. Consequently, if handled properly, discarded sablefish can experience high rates of survival (Olla, et al., 1998)." *Supra*, Dr. James Hastie, p.1.

⁹ See: p. 1-5, DEIS 2/15/04

¹⁰ Section 301(a) (9). Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1851(a)(9)). See Also: p.1-1, DEIS 2/15/04

would most probably be forced to seek more foreign producers of live Sablefish and Shortspine thornyhead to offset his loss of domestic supply from D'Amato.

Comments: Council Preferred Alternative 7:

D'Amato and Kingfisher note that the Council has adopted a new alternative as their preferred alternative, labeled Alternative 7. The Council reports that "Alternative 7 incorporates elements from Alternative 1 (current measures), Alternative 4 (bycatch caps), and Alternative 5 (individual fishing quotas)."

D'Amato and Kingfisher are concerned that Alternative 7, in making efforts to comply with National Standard 9 of the Magnuson-Stevens Act and with the rulings in the PMCC case may result in the allocation of the OYs for Sablefish and Shortspine thornyhead that will be substantially harmful to the economic viability of the D'Amato Fishery.

D'Amato is concerned that the imposition of bycatch caps and Individual fishing quotas will necessitate the placement of full-time Observers aboard their small vessels as a condition of economic survival.¹¹ This means a significant increase in their operational costs and operating burdens.

We note the coverage on this Full-time Observer issue in discussing Alternative 4, at pages 4-197-198, and in discussing Alternative 5, at pages 4-208-209. This coverage is primarily concerned about the substantial bycatch issues related to trawl gear. The DEIS does not provide the decision makers and the interested public with an adequate information or even discussion on what should be done with fisheries like that of the D'Amato Fishery wherein the existing FMP and implementing regulations have resulted in bycatch reduction "to the extent practicable".

On the bycatch caps issue: Currently, nine fishery sectors are identified by the DEIS. For the purpose of reducing bycatch, the DEIS suggests that additional sectors could be established by subdividing any of the existing nine sectors.¹² This would permit partial observer coverage for the D'Amato Fishery. However, the DEIS suggests that if vessels arrange full-time observers, they should be rewarded with larger trip limits or other forms of catch advantages.¹³ This could mean larger allocations of Sablefish and Shortspine thornyhead as consideration for such full-time Observer vessels and smaller allocations to the D'Amato Fishery types. D'Amato cannot afford full-time Observers on their vessels. Continuous Observers on vessels of less than 26 feet in length create accommodation problems for both Observer and Operator. The live-fish trade in Sablefish and Shortspine thornyheads is based on a low volume and high value fishery product, using vessels with low operating and maintenance costs and no crew cost. Further, the trade needs the timely landing of the catch to coincide with demand throughout the calendar year, thereby enhancing revenue opportunities. Therefore, the concern that the imposition of rules that reward vessel operators who arrange full-time Observers means the high probability of no annual allocations or reduced annual allocations of the O Ys for Sablefish and Shortspine thornyheads for the D'Amato Fishery. This uncertainty of access to the live-fish resource would result in making the D'Amato Fishery an unreliable supply source for Kingfisher.

To further illustrate the concerns of D'Amato and Kingfisher: Under a proposal requiring bycatch caps and individual fishing quotas, we see the probability of a rule that the

¹¹ See: IFQs, p.2-13, DEIS 2/15/04; Bycatch caps, p. 2-11, DEIS 2/15/04

¹² See: p. 2-9, DEIS 2/15/04

¹³ See: pp. 2-9, 2-10, 2-11, and in particular p. 2-12, DEIS 2/15/04

allocates the Sablefish OY under conditions that would eliminate the live-fish fishery conducted for Sablefish under daily/weekly trip limit provisions by holders of permits that are not Sablefish-endorsed. There are about 225 permits limited-entry fixed gear permits, of which 164 are "Sablefish -endorsed" Sablefish-endorsed permits provide the permit holder with an annual share of the Sablefish allocated to the primary fishery for fixed gear permits. Sablefish-endorsed permits are assigned to one of three tiers . . . Each year, these shares are translated into amounts of poundage, or "tier limits", which may be caught during the primary fishery. For the 2003 season, these shares translated into tier limits of 53,000 for Tier 1, 24,000 for Tier 2, and 14,000 for Tier 3." ¹⁴ Under Alternative 7, the establishment of individual catch quotas require the elimination of trip limits as a tool to reduce bycatch. ¹⁵ This would result in establishing quotas only for individuals who had permits Sablefish-endorsed. This is probable because holders who do not have Sablefish-endorsed permits do not "share" the Sablefish allocated to fixed-gear permits. Thus, in a live-fish fishery that has no significant discards of overfished species, Alternative 7 could be constructed to eliminate the current live-fish fishery for Sablefish for the D'Amato Fishery. We note that the DEIS does not comment on this probable impact.

D'Amato and Kingfisher contend that the D'Amato Fishery does use a fishery method that is "rarely selective enough to catch only the most desirable species." ¹⁶ The value of the live-fish fishery is noted by the DEIS: "While non-trawl vessels took only 2% of the coastwide groundfish harvest by weight, their harvest accounted for about 25% of the exvessel value due to the prevalence of relatively high value sablefish and live fish landed in this fishery." (emphasis added) ¹⁷

D'Amato and Kingfisher questions the completeness of the DEIS. The DEIS does not provide information on those fisheries, who by their compliance with the Groundfish FMP and implementing federal regulations, make the FMP and implementing regulations consistent with National Standard 9. ¹⁸ For reasons stated above, the D'Amato and Kingfisher contend that the D'Amato Fishery is such a fishery. The DEIS fails to declare that if such fisheries do exist, then a universal application of new conservation and measures based on Alternatives 4 and 5 to all fisheries should nor should not be required. The DEIS makes no provision for providing that fisheries such as D'Amato need a different arrangement than proposed in the Alternatives.

D'Amato and Kingfisher do not understand why the DEIS assumes that their very selective fishing gear activity is identical to or the equivalent of non-selective fishing gear, i.e. trawl. The DEIS does not inform the decision makers on how gear types vary in their design and application in selective fishing grounds so as "to catch only the most desirable species." Such a failure in identification by the DEIS in Chapter 2 does not permit the decision-makers to make a reasoned and informed decision on the issue of whether the new tools of bycatch caps and individual fishing quotas proposed in Alternative 7 should be imposed on all groundfish fisheries regardless of their bycatch reduction record under the existing FMP and regulations.

¹⁴ **Supra**, Dr. James Hastie, p. 1

¹⁵ See: p. E. S.-9, DEIS 2/15/04 : "Alternative 5 would establish a "rights -based program of individual fishing quotas. . . . Reaching any quota would require the vessel to stop fishing until it obtained additional quota . . . Administration costs . . . would increase substantially. This would be partially offset by a reduced preseason process for developing trip limits and other management measures; the process of inseason trip limit adjustments would no longer be needed. . . . Social and economic conditions would be significantly affected; some changes would be beneficial, some would be adverse, depending on the individual and the quota program design.

¹⁶ See: p. 1-9, DEIS 2/15/04

¹⁷ See: p. 3-65, DEIS 2/15/04

¹⁸ See: Section 301(a), Magnuson-Stevens Fishery Conservation and Management Act.

D'Amato and Kingfisher propose that if a groundfish fishery subject to the existing FMP and implementing regulations has a bycatch record equal to better than the D'Amato Fishery, then they should be afforded with exemptions from the costs and burdens required by Alternatives 4, 5, and 7 on fisheries that do not have such a bycatch record, e.g. exemption from full-time or expanded observer coverage and reimbursement of costs for random Observer coverage. Further, that these fisheries should be benefited by the Council for this bycatch record if and when the Council considers an initial distribution of quota shares required by Alternative 5 or Alternative 7, that the formula take into consideration this bycatch record as part of the catch history. By having this "to the extent practicable" bycatch reduction record, these D'Amato Fishery types allow the Council to claim that the existing Groundfish FMP and implementing regulations, as they apply to these fisheries, are consistent with National Standard 9 of the Magnuson-Stevens Act.

Thank you for the opportunity to submit these comments and for the cooperation of your Sstaff Members located in Portland.

Sincerely,

August Felando

cc: D'Amato and Kingfisher

PACIFIC FISHERY MANAGEMENT COUNCIL

**7700 NE Ambassador Place, Suite 200
Portland, Oregon 97220-1384**

*CHAIRMAN
Donald K. Hansen*

*EXECUTIVE DIRECTOR
Donald O. McIsaac*

**Telephone: 503-820-2280
Toll Free: 866-806-7204
Fax: 503-820-2299
www.pcouncil.org**

April 27, 2004

Mr. Robert Lohn, Regional Administrator
National Marine Fisheries Service, Northwest Region
Building 1, BIN C15700
7600 Sand Point Way NE
Seattle, WA 98115-0070

RE: The Pacific Coast Fishery Management Plan Bycatch Mitigation Draft Programmatic
Environmental Impact Statement

Dear Mr. Lohn:

At its April 5-9, 2004, meeting in Sacramento, California, the Pacific Fishery Management Council (Council) reviewed the Pacific Coast Fishery Management Plan (FMP) Bycatch Mitigation Draft Programmatic Environmental Impact Statement (DPEIS) released on February 20, 2004, and identified its preferred alternative for NMFS to incorporate into the EIS. This would be identified as Alternative 7 in the Final Programmatic EIS (FPEIS) and would contain elements of several alternatives described in the DPEIS. The Council approved the following motion describing the recommended preferred alternative:

Create a new Alternative 7 that includes elements of Alternatives 1, 4, and 5. Elements from Alternative 1 that would be included in Alternative 7 would be all current programs for bycatch minimization and management, including but not limited to: setting optimum yield specifications, gear restrictions, area closures, variable trip and bag limits, season closures, establishing landings limits for target species based on co-occurrence ratios with overfished stocks, etc. The FMP would be amended to more fully describe our standardized reporting methodology program and to require the use of bycatch management measures indicated under Alternative 1 for the protection of overfished and depleted groundfish stocks and to reduce bycatch and bycatch mortality to the extent practicable. These would be used until replaced by better tools as they are developed.

Elements from Alternative 4 that would be included in Alternative 7 would be the development and adoption of sector-specific caps for overfished and depleted groundfish species where practicable. We anticipate phasing in sector bycatch caps that would include: monitoring standards, full retention programs, and individual vessel incentives for exemption from caps.

Mr. Robert Lohn

April 27, 2004

Page 2

Elements of Alternative 5 that would be included in Alternative 7 would be the support of future use of Individual Fishing Quota programs for appropriate sectors of the fishery. The FMP would incorporate the Strategic Plan's goal of reducing overcapacity in all commercial fisheries.

Additionally, baseline accounting of bycatch by sector shall be established for the purpose of establishing future bycatch program goals.

Consistent with our recommendation, we ask the EIS project team to further describe Alternative 7 as necessary for the purpose of making it consonant with the descriptions of the other alternatives and to support sufficient analysis of its impacts on the human environment, but to not change matters of intent substance.

After this action is finalized, the Council will consider undertaking preparation of a new groundfish FMP amendment consistent with the findings in the FPEIS. We look forward to working with NMFS after the release of the FPEIS to implement the policies and program direction described by the preferred alternative.

Sincerely,

A handwritten signature in black ink, appearing to read "D. O. McIsaac", with a long horizontal flourish extending to the right.

D. O. McIsaac, Ph.D.
Executive Director

KRD:rdd

Subject: Comments of the Pacific Coast Groundfish Draft Programmatic EIS]

Date: Tue, 27 Apr 2004 16:04:31 -0700

From: "Bycatch.nwr" <Bycatch.nwr@noaa.gov> **Internal**

To: Yvonne deReynier <Yvonne.deReynier@noaa.gov>,
Elizabeth Mitchell <Elizabeth.Mitchell@noaa.gov>

CC: Eileen Cooney <Eileen.Cooney@noaa.gov>

Comments from Peter Huhtala

Subject: Comments of the Pacific Coast Groundfish Draft Programmatic EIS

Date: Mon, 26 Apr 2004 11:34:44 -0700

From: "Peter Huhtala" <peter@pmcc.org>

To: <bycatch.nwr@noaa.gov>

Dear Jim,

I know that you've been working to find a way to quantify bycatch in the recreational groundfish fisheries, at least in order to attempt to develop a baseline of current discard levels. An important adjunct to this effort, in my view, is to assess the **adequacy** of recreational monitoring systems now in place as standardized bycatch reporting methodologies. The follow-up analysis to this examination of adequacy would be to look at the practicability of various means of improving recreational accounting. Such an analysis could prove very useful in informing the debate over the recreational data collected and provided to management by the state of California, for example.

While analyzing the adequacy of current systems, and the practicability of improvements, I believe that it is also important to address how recreational accounting systems meet, or could meet, objectives established for the Bycatch Program EIS, including:

- account for total fishing mortality by species
- establish monitoring and accounting mechanisms to keep total catch of each groundfish stock from exceeding the specified limits
- monitor incidental catch and bycatch in a manner that is accurate, timely, and not excessively costly
- gather information on unassessed and/or non-commercial species to aid in development of ecosystem management approaches.

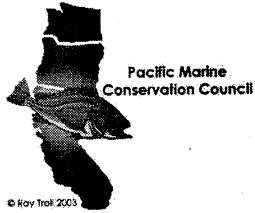
Thank you for considering this very important aspect of improving this EIS.

Sincerely,

Peter Huhtala
Senior Policy Director
Pacific Marine Conservation Council
PO Box 59
Astoria, Oregon 97103
(503) 325-8188

APR 30 2004

Salmon Recovery
Division



April 27, 2004

Mr. D. Robert Lohn
Regional Administrator
NMFS Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115-0070

RE: Comments on the Pacific Coast Groundfish Bycatch Draft Programmatic EIS

Dear Administrator ^{Bob} Lohn:

This letter transmits our comments and attachments on the above-referenced document. Thank you for the opportunity to comment. Do not hesitate to contact us if you have any questions.

Sincerely,

Karen Garrison
NRDC

Peter Huhtala
PMCC

Jim Ayres
Oceana

Chris Dorsett
Ocean Conservancy

cc: Susan Kennedy
Dr. Don McIsaac
Jim Glock

**Comments of the
Natural Resources Defense Council
Pacific Marine Conservation Council
Oceana
The Ocean Conservancy**

**on the
Pacific Coast Groundfish Bycatch Management
Draft Programmatic Environmental Impact Statement**

The organizations above submit these comments concerning the Draft Programmatic Environmental Impact Statement for Pacific Coast Groundfish Bycatch Mitigation Program ("DEIS") for consideration by the National Marine Fisheries Service ("NMFS").

While this DEIS is an improvement when compared to previous National Environmental Policy Act analyses for the groundfish fishery, several key flaws remain. In particular, the conversion of this EIS from one intended to take a programmatic look at the groundfish Fishery Management Plan as a whole, to one intended to remedy NMFS's bycatch failures in particular, has resulted in a document that accomplishes neither purpose adequately. The first two sections of these comments provide examples of the National Environmental Policy Act and Magnuson-Stevens Act violations. The last section discusses the preferred alternative.

National Environmental Policy Act

The National Environmental Policy Act ("NEPA") requires that federal agencies prepare environmental impact statements ("EISs") for major federal actions significantly affecting the quality of the human environment. Fishery Management Plans and the ongoing fisheries that they regulate are major federal actions requiring the preparation of Plan-level EISs. The agency originally framed the DEIS as a programmatic EIS, intended to examine the effects of implementation for the Fishery Management Plan as a whole.

In response to a court ruling that the Pacific Region's bycatch program is illegal, *Pacific Marine Conservation Council v. Evans*, 200 F. Supp. 2d 1194 (N.D. Calif. 2002), the agency converted the EIS from a programmatic one to one focused on bycatch. The focus on bycatch was intended to bring the Pacific bycatch program into compliance with the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"). Accordingly, this DEIS is no longer intended to be a Plan-level EIS. Unless and until NMFS completes a legally adequate assessment of the direct, indirect, combined and cumulative effects of the groundfish fisheries as a whole, the agency will not meet its legal obligations under NEPA.

Notwithstanding the lack of an overarching FMP-level analysis, this DEIS also fails to meet NEPA's requirements as a bycatch-focused EIS. In particular, it is unduly vague, omits disclosure and analysis of relevant information, and is not designed to result in

prompt action via the immediate fishery management plan amendment necessary to cure the ongoing violation of the MSA. While we have substantial additional comments, the extremely general nature of the DEIS is our overriding concern and must be remedied.

NEPA Background

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Its goal is “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* § 1500.1(c). To meet this purpose, NEPA requires that agencies prepare an environmental impact statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An EIS “is more than a disclosure document” and is to “be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.” 40 C.F.R. § 1502.1. It is, therefore, “an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” *Id.*

NMFS Must Prepare a Programmatic EIS

NEPA requires that an EIS be prepared for major federal actions, including the “[a]doption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.” *Id.* § 1508.18(b)(2); *see also* § 1502.4(b) (“Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations.”). For those types of federal actions, the agency is required to produce a “programmatic environmental impact statement” evaluating the broad implications of the proposed policy or program changes. The continued management of the Pacific groundfish fishery is such a broad agency action, and must be evaluated in a fishery management plan-level EIS. This EIS is no longer intended to accomplish this purpose, and at present, NMFS has no apparent plans to prepare a plan-level EIS. This NEPA defect must be remedied as quickly as possible.

The Bycatch DEIS is Missing Basic Information, Including Analysis of Current Bycatch Levels

Notwithstanding whether it evaluates a broad federal program or more discrete action, an EIS must fully and fairly evaluate the direct, indirect and cumulative effects of the proposed action and its alternatives. 40 C.F.R. § 1502.16. At the foundation of this analysis is the disclosure and discussion of all relevant information. Consideration of all relevant information is so important to successful EISs that federal agencies are required to go through a specific process when information is incomplete or unavailable. 40 C.F.R. § 1502.22. This DEIS fails to provide the public and the decisionmaker with the information necessary to make an informed and rational decision about bycatch minimization in the Pacific.

The most fundamental information necessary to assess bycatch avoidance and minimization measures is species-specific information on current bycatch and discard amounts by fishing sector. Some of this information is available or could be assembled from available sources (see *Modeling Bycatch and Discard in the Limited-entry Trawl Fishery* prepared by Dr. James Hastie (March 2004), and Appendix B, the Report of the 2002 West Coast Groundfish Observer Program (WCGOP) (January 2003)), but the DEIS fails to present and analyze the relevant information in a form that makes it accessible to decision makers. The Pacific Fishery Management Council's Scientific and Statistical Committee echoed this concern in its April 2004 statement: "...the PEIS does not currently contain information on current bycatch and discard amounts, though such information is available. The SSC recommends that future work estimate ranges of bycatch reduction, relative to the status quo, for each of the alternatives to better inform decision-making." This flaw alone is fatal to the DEIS and must be remedied prior to the Final EIS.

The Bycatch DEIS Analysis is Deficient

In addition to omitting fundamental information, the analysis in the DEIS is too vague to result in rational, informed decision-making. For example, in the discussion of the data reporting effects of Alternative 4, the DEIS notes that controls imposed under the alternative:

would have a direct effect of reducing bycatch of overfished species compared to the first three alternatives. Discard may also be reduced in the commercial fishery compared to the first three alternatives as fishers are more likely to retain catches of all usable fish, including overfished species.

DEIS at 4-118. While the DEIS assigns Alternative 4 a rank of 2-3 (out of 5, with 1 being the highest ranking) under this section, the document should contain a more concrete discussion of the magnitude of the effect of the bycatch reduction (see SSC comments above). Can the effect be modeled to produce a quantitative estimate, or at least a range of anticipated effects? Without more specific information, it will be difficult for the Council and NMFS to determine which bycatch reduction measures are practicable and, thus, legally required.

Similarly, in the discussion of the effects of gear restrictions under Alternative 4, the DEIS outlines various gear issues such as escape panels in fish traps and fish excluder devices, DEIS at 4-116, but does not explain why it mentions these modifications or what the effects would be if they were or were not adopted.

The DEIS systematically downplays the potentially beneficial effects of Alternative 4. For example, in Table ES.6(b), the DEIS states that there is no direct, indirect, or cumulative effect of Alternative 4 on ecosystem or biodiversity. Yet Alternative 4 would be expected to reduce bycatch, thereby increasing abundance of particular species and

improving rebuilding outlooks, clearly with resulting positive impacts on the ecosystem and biodiversity.

Similarly, sector catch limits would provide incentives to fishing industry participants to avoid bycatch, which would have the effect of reducing regulatory bycatch. DEIS Table 4.1.1. In Table 4.1.2, the DEIS suggests that sector allocations or catch limits would have no effect on abundance (presumably of fish species in the Pacific), even though, again, reducing bycatch should improve abundance, particularly in cases where excess bycatch has led to overharvests of overfished species like bocaccio. (Table 4.1.2 also makes no mention of the potential socioeconomic impacts of sector allocations, catch limits and individual quotas, although these tools would almost certainly have such impacts.) Table 4.1.3 likewise indicates that sector allocations would have only a minor indirect effect (as far as one can determine despite the extremely small and hard-to-read type in this table) on reducing regulatory bycatch of overfished species, which seems implausible. Elsewhere, the DEIS asserts that “[i]ndividual vessels may not have as strong of an incentive to avoid overfished species as in Alternatives 5 and 6.” DEIS at 4-115. This statement suffers from the generality common to the document; the reader is left to surmise its basis and the magnitude of any such effect.

One reason the discussion of impacts of the alternatives is deficient is because it fails to connect the alternatives to the statutory goals that the agency must meet. None of the alternatives includes a discussion of specific bycatch performance standards and results associated with each bycatch minimization tool. An alternative involving hard bycatch caps and rockfish conservation areas is rendered meaningful only when analysis of the alternative addresses how much bycatch reduction will be sought and achieved from implementation. Moreover, clear goals and criteria (more generally, performance standards) help encourage more selective gear and practices and a more efficient fishery.

Performance standards are a set of goals, criteria and indicators used to identify a target and measure progress toward meeting it. An example of goals, in this case, are those set by the MSA, to minimize bycatch and, to the extent bycatch cannot be avoided, minimize the mortality of bycatch. “Criteria” refers to specific means of assessing whether management goals and objectives are being met. “Indicators” include numeric or qualitative targets for reducing various types of bycatch, e.g. reduction of bycatch amounts by a certain percent. The analysis of the alternatives should include a discussion of the role of bycatch performance standards in making sure a set of measures accomplishes its purpose. The preferred alternative acknowledges the need for the bycatch reduction program to include such goals by stating that “[b]aseline accounting of bycatch by sector shall be established for the purpose of establishing future bycatch program goals,”¹ but the DEIS provides no discussion or analysis that would assist the Council and NMFS in setting them.

Further, the discussion of the economic impact of alternative 4 contains virtually no numerical estimates of any costs of the alternative (except for an estimate of the budget

¹ 4/7/04 Draft Proposal for a Preferred Alternative for the Groundfish Bycatch PEIS, Exhibit C.13.b, April 2004 Council meeting, as amended

for observers). See DEIS 4-195 to 4-204. Nor does the document set forth even a range of costs or comparison of costs with the other alternatives. As with other issues, the discussion remains at a very general level. For example, the DEIS states that yellowtail rockfish and other healthy stocks could be more accessible if sector bycatch reduction efforts were successful, DEIS at 4-197, although a free rider problem could inhibit bycatch reduction if sectors are too large and/or there is no pressure from within the group to hold down bycatch and keep the sector open, DEIS at 4-196. The DEIS should address whether the proposed sectors are too large or lack necessary safeguards so that free riders may decrease incentives to reduce bycatch and specify the magnitude of the economic benefits that could result if the incentives are successful. The SSC highlights this problem also: "the need for quantitative information about respective costs and other practicalities under each of the alternatives is needed for the Council to make an informed choice among alternatives."

To the extent relevant information is incomplete or unavailable, the Fisheries Service must comply with the disclosure and analytical requirements of NEPA's implementing regulations. 40 C.F.R. § 1502.22. Failure to do so denies the public and decisionmaker the analysis necessary to make an informed decision and constitutes a violation of NEPA.

The DEIS must analyze impacts on habitat-forming species

The MSA regulates all "forms of marine animal and plant life other than marine mammals and birds," 16 U.S.C. § 1802(12), a definition that includes species such as coldwater corals, sponges and anemones that provide structure and habitat. The DEIS mentions these "miscellaneous species" in a paragraph in the "affected environment" section (p. 3-38) but does not include even a qualitative discussion on effects of various alternatives on these species. There exist several sources of information on the presence of these species in waters that are trawled, including observer data, trawl survey data, and data from ocean explorations. Given that many corals, sponges and anemones are generally slow growing and stationary, measures such as areas closed to bottom trawling may be more effective than other strategies for minimizing their bycatch. The DEIS must analyze fully the bycatch issues presented by these species.

The specific examples we have discussed above are illustrative of a wider failure by the DEIS to fully analyze the environmental consequences of the proposed action. Without substantially improving its analysis, this EIS will not provide the public, the agency, or the Council with the tools and information necessary to ensure that bycatch and bycatch mortality are minimized to the extent practicable.

Magnuson-Stevens Act

Any fishery management plan and any regulation promulgated to implement an FMP must be consistent with the ten national standards specified in the MSA. National Standard 9 requires that:

Conservation measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

16 U.S.C. 1851(a)(9). The Act further requires that Fishery Management Plans must:

establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery, and include conservation and management measures that, to the extent practicable and in the following priority – (A) minimize bycatch; and (B) minimize the mortality of bycatch which cannot be avoided.

16 U.S.C. 1853(a)(11). Congress required these legal obligations to be met by October 1998.

DEIS inaccurately suggests the status quo complies with Magnuson-Stevens Act

Previous attempts in the Pacific Region to comply with these mandates have failed. See *Pacific Marine Conservation Council v. Evans*, 200 F. Supp. 2d 1194 (N.D. Calif. 2002) (“PMCC”). The federal court decision in *PMCC* rejected Amendment 13 to the groundfish Fishery Management Plan because, among other things, it failed to include an adequate assessment methodology and failed to minimize bycatch and bycatch mortality. The DEIS acknowledges that action is needed to reduce bycatch and collect appropriate information, DEIS at 1-1, citing the *PMCC* holding that the current system “failed to establish a standardized reporting methodology” and “failed to minimize bycatch and bycatch mortality because it failed to include all practicable management measures in the FMP itself.” Further, the DEIS notes that the current structure allows for overfishing in some cases (DEIS at 4-73 n.5). As the document states, “[o]verall, the current bycatch program provides little individual bycatch accountability or opportunity or incentives for individuals to reduce bycatch.” DEIS at 1-12. See also DEIS at 2-19 (“The current [bycatch monitoring] program minimizes user and agency costs of monitoring catch and bycatch at the expense of precision and timeliness”).

Yet elsewhere the DEIS suggests that the status quo alternative may comply with the Magnuson-Stevens Act. See DEIS at 5-19, 5-13. This suggestion is wrong, and is very misleading to the public and the decisionmaker. The DEIS must acknowledge that the status quo violates the MSA. Inasmuch as Alternative 1 is illegal, the DEIS must point out that only alternatives that offer a substantial improvement over that alternative are legal. Thus, for example, Alternatives 2 and 3, which the summary chart on page 2-19 indicate have only “insubstantial” improvements in bycatch reduction and monitoring, would appear to continue to violate the MSA.

The DEIS must evaluate the adequacy of the standardized reporting methodology for assessing the amount and type of bycatch occurring in the groundfish fishery

A fundamental flaw of the current DEIS, under both the MSA and NEPA, is the failure to review current bycatch reporting methodologies and bycatch types and amounts in the various sectors of the groundfish fishery. While the DEIS contains a general discussion of data reporting, monitoring and reporting requirements² and includes the report of the 2002 West Coast Groundfish Observer Program (WCGOP) as Appendix B, it provides neither an analysis of current reporting methodologies and their effectiveness, nor estimates of the amount and type of bycatch by sector of groundfish or other species. Furthermore, information on bycatch or bycatch assessment methodologies included in other reports is not included here (for example see *Modeling Bycatch and Discard in the Limited-entry Trawl Fishery*, James Hastie, March 2004, and NMFS's report *Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs*, Powers, 2003³).

Appropriate goals of bias, precision and accuracy for the observer program must be identified and the program analyzed for adequacy relative to these goals, consistent with the fishery management tools proposed in the DEIS. In addition, the alternatives analysis should identify changes that would be needed in bycatch reporting methodologies to implement the alternative. Observer data is currently not tabulated during the season but is compiled in annual summaries – after being matched with the logbook information. A different system will be needed for “real-time” data collection, which would be required in some sectors for certain alternatives including the preferred alternative. Because the observer program relies on comparisons with logbook and fish ticket data for analyses, the state data-gathering programs may also need to be analyzed for necessary changes.

We urge NMFS to undertake a comprehensive review of current reporting methodologies as well as current bycatch information for each sector of the groundfish fishery. Without this analysis the DEIS will fail in its primary role of facilitating an informed decision based on an understanding of environmental impacts and the requirements of the MSA. We briefly discuss the information gaps in the DEIS for each sector below.

Commercial Fishing Vessels

Section 3.4.2 of the DEIS provides a general description of the commercial groundfish fishery including their range, target species, landings and revenues. However, no information is given regarding known bycatch species and amounts or current reporting methodologies to acquire this information.

Limited-Entry Trawl Fisheries. Section 3.4.2.1 of the DEIS describes the limited entry groundfish trawl fishery and the at-sea and shoreside whiting fisheries. Unfortunately, no bycatch information is given in this section despite available information on both reporting methodologies for these fisheries and estimates of the amount and type of bycatch occurring in the fishery.

² See section 4.1.4 of the EIS

³ The Powers report, available on NMFS website, is hereby incorporated by reference.

For limited-entry non-whiting trawl fisheries, the DEIS includes a brief discussion of the WCGOP in section 3.4.9 and includes the 2003 WCGOP Report as Appendix B. The methodologies described in this document, when combined with analysis of fleet logbooks and fish tickets to quantify effort, provide information on bycatch of twenty-three species observed by the program. The DEIS should provide estimates of bycatch for these species and note limitations of the current observer program, if any, in identifying and quantifying all bycatch, not just those species that are overfished or commercially or recreationally valuable, taken in this fishery. The DEIS should also reference the Powers report which provides an analysis of the limited-entry trawl fishery, noting that the current WCGOP is classified as a “developing” reporting system and that the bycatch rank is considered “high” in terms of vulnerability of the fishery to fish bycatch.

At-Sea and Shoreside Whiting Fisheries. Again, no bycatch information or description of current bycatch reporting methods besides the general information listed above is present for these fisheries despite available information. According to analysis in the Powers report, the at-sea whiting fishery is a “mature” reporting system while the shoreside fishery has a “pilot” monitoring program. A description of these programs and limitations, if any, of accounting for all bycatch in the fishery should be included in this section. Furthermore, table 3.5.2-18 from the 2004 Groundfish Annual specifications EIS,⁴ includes bycatch in the whiting fishery from 1998-2003 for overfished groundfish species. This information must be included in the EIS to allow reasoned decision-making.

Limited-Entry Fixed Gear Fisheries. Section 3.4.2.2 of the DEIS describes target species, vessel participation, landings and revenue amounts for the fixed gear (longlines and traps) groundfish fishery. This sector of the groundfish fishery is also monitored by the WCGOP as of 2003. Available information from observed bycatch must be presented in the DEIS including limitations, if any, of the program in assessing the amount and type of all bycatch occurring in these fisheries. The Powers report ranks non-trawl gear “high” in terms of vulnerability of the fishery to fish bycatch and classifies the current reporting system as “developing.”

Open-Access Directed Groundfish Fishery. Section 3.4.2.3 of the DEIS estimates the number of vessels without limited-entry permits that land groundfish including participation over time. However, no information is presented describing estimates of bycatch amounts and type in these fisheries and current methodologies for assessing bycatch. If no information is available the DEIS should state as much, discuss the impacts of this information gap, and describe options for filling it.

Recreational Fishing

Section 3.4.3 of the DEIS describes estimated recreational fishing effort on the West Coast. It fails to provide any estimates of the amount and type of bycatch occurring in

⁴ Proposed Acceptable Biological Catch and Optimum Yield Specifications and Management Measures for the 2004 Pacific Coast Groundfish Fishery, Draft Environmental Impact Statement. October 2003.

the fishery or the current reporting methodology for bycatch despite available information. Recreational effort and catch is currently monitored by the states of California, Oregon and Washington. These monitoring programs include estimates of landed catch and fish that are released (bycatch). Current monitoring programs should be described in the EIS including limitations, if any, in reporting accurate bycatch information by type and amount and steps needed to fill reporting gaps. The DEIS should utilize what information exists from Fisheries of the United States-2002⁵, which details data collection and catch and bycatch amounts for recreational fisheries on the West Coast, and other sources.

Tribal Fisheries

Section 3.4.4 of the DEIS provides a description of tribal groundfish fisheries, including information on landings and revenue. Again, no information is presented regarding bycatch, bycatch-reporting methodologies for these fisheries, their limitations, or steps needed to fill the gaps.

Other Fisheries That Affect Groundfish

Section 3.4.10 of the DEIS describes open-access non-groundfish fisheries that may take groundfish as bycatch. However, the description is limited to a brief characterization of the fishery. No information is included on the amount or type of groundfish bycatch, current reporting systems and their limitations for collecting information on bycatch, or additional steps needed to quantify bycatch of groundfish in these fisheries.

The DEIS fails to provide adequate information to determine which measures are practicable

With respect to compliance with National Standard 9, the DEIS should note that the MSA requires that practicable bycatch reduction measures be implemented. Except insofar as two alternatives provide the same benefits with respect to bycatch reduction, practicability is not "part of" (DEIS at ES-10) the decision. The Council and NMFS cannot reject a practicable bycatch alternative because it does not "provide the optimal balance" (DEIS at 1-21) between costs and benefits. Instead, the MSA requires that regulators implement all practicable means of reducing bycatch – period. This legal requirement attached in 1998, not at the conclusion of a follow-on NEPA process tiered to this "programmatic" DEIS.

In rejecting Amendment 13, the court specifically criticized the Amendment because it "ignored the fact that overfished Pacific groundfish species need protection from excessive bycatch now, not at some undetermined time in the future." Years later, these legal mandates have yet to be met, and this DEIS does not provide adequate information to allow the agency to immediately implement all practicable bycatch minimization measures. The DEIS must be improved to provide the necessary information to decisionmakers and the public to determine which bycatch reduction measures are

⁵ Fisheries of the United States 2002. National Marine Fisheries Service. September 2003.

practicable. Such measures must be evaluated by the agency and be implemented through FMP amendments at the conclusion of the NEPA process. A “programmatic” and non-specific evaluation resulting in future NEPA process complies with neither NEPA nor MSA, serves neither the public nor the decisionmaker, and disserves the fish and those who rely upon them. The DEIS must provide sufficient information about the environmental and related socio-economic effects of the alternatives to enable NMFS to make a practicability determination about each technique in the record of decision on the DEIS. Because the DEIS fails to provide this necessary information, it violates the requirements of NEPA.

The Preferred Alternative

We are pleased that the preferred alternative adopted by the Council at its April 2004 meeting, as we understand it, appears to contain elements of an adequate program. However, additional analysis of the adequacy of the bycatch reporting methodology and the steps needed to make it more complete and useful is essential. Likewise, identification of bycatch amounts and type by sector is necessary to allow NMFS and the Council to identify priorities, goals, and detailed measures to implement a bycatch reduction program. Lacking those details, we provide brief general comments to supplement our recommendations prior to the April Council meeting regarding the preferred alternative (attached).

The Preferred Alternative Must Include an Adequate Reporting Methodology

The preferred alternative must establish a comprehensive bycatch reporting methodology that measures the amount and type of bycatch consistent with the criteria in the Powers and Pikitch⁶ reports, as opposed to simply continuing the status quo or better describing the current reporting methodology. Where data on the amount and type of bycatch are available, they should be included in the DEIS. The gaps in the data, and the additional requirements imposed by the measures to be applied under the preferred alternative, such as more real-time accounting for bycatch in sectors with hard bycatch caps, should help guide the development of a more comprehensive and timely reporting methodology. The Powers and Pikitch reports provide guidance for the development of sector-based reporting methodologies and priority setting based on bycatch threat and other factors. A timeline must then be developed for establishment of a reporting methodology for each sector.

The Preferred Alternative Must Minimize Bycatch to the Extent Practicable

We support a preferred alternative that employs a combination of hard bycatch caps by sector, continued and evolving use of bottom fishing closures and other current tools, and performance standards that set clear goals for bycatch reduction. The preferred alternative should ensure not only that overfishing is prevented and rebuilding is accomplished consistent with the MSA, but also that bycatch of all marine life is reduced and

⁶ Pikitch, Ellen K and Elizabeth A. Babcock. How Much Observer Coverage is Enough to Adequately Estimate Bycatch? This report is hereby incorporated by reference.

minimized. We believe the bycatch reduction program is most likely to succeed if it includes incentives for individuals and groups of fishermen to lower their bycatch rates. Our suggestions for initial sector divisions, incentive programs, and other features of a preferred alternative using hard bycatch caps are described in our previous comments.

Conclusion

As currently drafted, the DEIS is an improvement on previous NEPA documents on Pacific groundfish but falls short of the requirements of NEPA and the MSA. The preferred alternative holds the potential to achieve significant reductions in bycatch, if designed and implemented well, and if modified to include a more complete bycatch reporting methodology. We look forward to working with NMFS to assist in improving the document to facilitate sound management decisions, and help develop an effective bycatch reporting and minimization program.

Attachment 1

** Natural Resources Defense Council ** The Ocean Conservancy **
** Oceana ** Pacific Marine Conservation Council **

April 2, 2004

Mr. Don Hansen, Chair
Pacific Fishery Management Council
7700 NE Ambassador Place NE, Suite 200
Portland, OR 97220-1384

Re: Agenda Item C.13: Bycatch Environmental Impact Statement (EIS)

Dear Mr. Hansen:

Please find enclosed a draft proposal for counting and minimizing bycatch in the Pacific groundfish fishery. This draft proposal is a modification of Alternative 4 in the Groundfish Bycatch Environmental Impact Statement (EIS) issued by NOAA Fisheries in February 2004. We ask that the Pacific Fishery Management Council (PFMC) recommend that NOAA Fisheries analyze this modification of Alternative 4 in the final EIS. Furthermore, we ask that the PFMC adopt this option as its preferred alternative.

This proposed alternative (we'll call it 4b) combines sector caps with continued use of spatial management to minimize bycatch. It provides incentives, in the form of a higher trip limit provided from a reserved portion of the optimum yield, to fishermen who want individual caps and will fund their own observer coverage. Furthermore, the proposal details a standardized reporting methodology to assess the amount and type of bycatch in the fishery.

Our proposal focuses on an effective alternative that provides accountability and that can be readily implemented. We thank the PFMC for considering our request and would be happy to answer any questions about our proposal.

Sincerely,

Chris Dorsett
The Ocean Conservancy

Peter Huhtala
Pacific Marine Conservation Council

Karen Garrison
Natural Resources Defense Council

Phil Kline
Oceana

Attachment

Attachment 2

Draft Proposal for Counting and Minimizing Bycatch in the West Coast Groundfish Fishery

March 31, 2004

This proposal to count and minimize bycatch relies on enhanced bycatch observation in the groundfish fishery, the use of bycatch caps for sectors of the groundfish fishery, and the continued use of spatial management to reduce bycatch. The sectors referred to in this document match those currently used in the Council's "bycatch scorecard" and can be further subdivided by area. We propose that a statistically adequate reporting methodology to assess the amount and type of bycatch occurring in each sector of the fishery be established using the criteria contained in "Evaluating Bycatch: A National Approach to Standardized Bycatch Monitoring Programs" (Powers Report) and "How Much Observer Coverage is Enough to Adequately Estimate Bycatch" (Pikitch report). Implementation will be phased in over time based on a ranking of need and feasibility consistent with these reports.

Proposed Alternative to Minimize Bycatch in the Groundfish Fishery

The proposed alternative is a modification of Alternative 4 in the Bycatch EIS. This proposed alternative would combine sector caps with continued use of spatial management to minimize bycatch. The groundfish fishery will initially be subdivided into the sectors defined by gear type (limited entry trawl, fixed gear, etc), as used in the bycatch scorecard (attached). These sectors may be further subdivided by the Cape Mendocino line (40-10) into North and South components and by the RCA, into fishing zones seaward and landward of the RCA. Vessel operators who want to fish both seaward and landward of the RCA must provide proof of past fishing in both of these areas using catch history for that vessel over the past three years. Upon further analysis, these sectors may be further subdivided into geographical areas to fit area-based management initiatives.

Caps on total mortality of each overfished species will be established for each sector, and a sector will be closed to fishing upon attainment of any of these caps. Additional management measures will be employed to ensure that the total mortality of every managed species stays within its OY.

Boats from within a sector can opt out of the sector cap, thereby preserving the opportunity to continue fishing if their sector is shut down, by meeting some established criteria such as funding 100% observer coverage for one's vessel. Upon opting out, a commercial vessel would get individual bycatch caps and incentives such as higher trip limits from a reserved portion of target species OY. This cap would be deducted from that of the vessel's sector. Vessels that opt out of sector allocations can form collectives

to pool bycatch quotas amongst collective members. The entire collective is prohibited from further fishing once a collective bycatch cap is met.

Furthermore, vessels are permitted to switch to another sector by changing gear type. Similar to those vessels that opt for individual bycatch caps, bycatch cap amounts will transfer with the vessel to the new sector.

The initial bycatch caps will be for those species identified on the bycatch scorecard (bocaccio, canary rockfish, etc.), and the most current bycatch scorecard will be used to apportion the OY of each species among the sectors. The Council will review bycatch rates for other managed species not contained on the bycatch scorecard. If bycatch rates for these species are higher than an established threshold, a bycatch cap will be set for those species, and gradually reduced over time. As OY levels increase for the capped species, the increase beyond what may be needed as a buffer will be allocated to operators with the lowest bycatch rates among those with individual caps, and through other means that provide incentives for bycatch reduction individually, by sector and within collectives.

For species without set OYs (for example, unassessed species), information will be collected through a standardized reporting methodology for bycatch. After a to-be-determined time period of data collection, a bycatch cap will be established for individual species or species groups if bycatch of any unmanaged species is found to increase or decrease by 10% or more relative to the previous year. After a set number of years (e.g. five) after establishment of a bycatch cap, bycatch would be reduced by some set percentage (10%, for example) per time period through reductions in the caps, while providing incentives for those most successful at avoiding bycatch. In the interim, bycatch of unassessed and other species will be minimized by use of the RCA and additional spatial management measures as needed (for example, on the slope).

Establishing a Standardized Reporting Methodology for Bycatch

A bycatch reporting methodology will be established consistent with the criteria in the Powers and Pikitch reports. Groundfish fishing sectors will be analyzed consistent with these reports within the following categories: status of current reporting methodologies and bycatch interaction (fish, endangered animals and marine mammals). The sectors will then be ranked within the two categories. After consultation with appropriate NMFS and PSMFC staff, decisions will be made as to which sectors should be considered priorities for an enhanced reporting methodology. A timeline will be developed for establishment of this reporting methodology for each sector.

Reference Documents:

Powers report:

Bycatch EIS:

Pikitch report: <http://www.oceana.org/uploads/BabcockPikitchGray2003FinalReport.pdf>

U.S. Department of
Homeland Security

United States
Coast Guard



Commander
U. S. Coast Guard Pacific Area

Bldg 51-6
Alameda, CA 94501
Staff Symbol: P
Phone: (510) 437-3020
Fax: (510) 437-3774

16214

APR - 9 2004

United States Department of Commerce
National Oceanic and Atmospheric Administration
Domestic Fisheries Division
Attn: Galen R. Tromble, Chief
National Marine Fisheries
Silver Spring, MD 20910

Dear Mr. Tromble:

Thank you for providing us the opportunity to comment on the *Pacific Coast Groundfish Draft Programmatic Environmental Impact Statement (DPEIS)*. After careful review, we offer no comment, as the changes recommended in this amendment will not affect the Coast Guard's ability to perform its living marine resources statutory responsibilities.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Cross", written over a circular stamp.
TERRY M. CROSS

AR040381

4/9/04

1504-15-2000-08-010694

AK041647
4/28/04



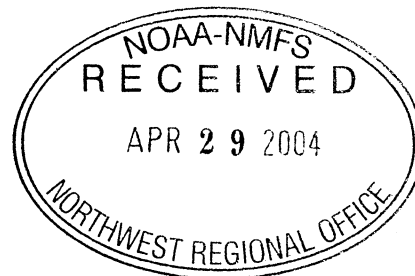
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

April 28, 2004

Reply To
Attn Of: ECO-088

Ref: 03-077-NOA

D. Robert Lohn, Regional Administrator
NMFS/NOAA - Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115-0070



Dear Mr. Lohn:

The U.S. Environmental Protection Agency (EPA) has reviewed the draft Environmental Impact Statement (EIS) for **The Pacific Coast Groundfish Fishery Management Bycatch Mitigation Program** (CEQ #040081) in accordance with our responsibilities under the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act. Section 309, independent of NEPA, specifically directs EPA to review and comment in writing on the environmental impacts associated with all major federal actions and the document's adequacy in meeting NEPA requirements.

The draft EIS analyzes the Pacific Fishery Management Council's (Council) objectives for its bycatch mitigation program and evaluates alternative programs to achieve those objectives. This EIS was developed to meet Magnuson-Stevens Fishery Conservation and Management Act National Standard 9 and Section 303(a)(11) requirements to minimize bycatch and bycatch mortality and standardize reporting methodologies to assess the amount and type of bycatch occurring in the fishery.

The EIS describes the No Action/Status Quo alternative (Alternative 1) and five action alternatives. Alternative 2 proposes to reduce groundfish regulatory discard by increasing groundfish trip limit sizes and reducing the number of commercial fishing vessels (50% reduction) while maintaining as long a fishing season as possible. Alternative 3 would reduce regulatory discard by increasing groundfish trip limit size and reducing fishing time without further reducing the number of trawl vessels as proposed in Alternative 2. Alternative 4 would reduce bycatch by expanding the definition of "trip limit" to include catch or mortality limits for overfished species. Catch limits would not be transferable between vessels and would expire at the end of each period. Catch limits would be established for overfished groundfish species and vessels would be required to stop fishing when a catch limit for a sector is reached. Alternative 5 would reduce bycatch by assigning annual catch limits or individual quotas to each limited entry

commercial fisher, vessel, or other qualified entity. Catch limits would apply to overfished groundfish stocks, but quotas would also be established for other groundfish stocks. Certain gear restrictions and other regulations would be relaxed to allow fishers to develop practices to catch healthy groundfish stocks while avoiding the catch of overfished groundfish stocks.

Alternative 6 would reduce bycatch by establishing long term closed areas where overfished groundfish and other sensitive species are most likely to be encountered, establishing incidental catch limits for individual vessels, prohibiting or severely restricting discard of groundfish species and accurately accounting for all catch. This alternative would emphasize the identification and use of alternative fishing gears and methods that avoid capture of restricted species.

Based on our review and evaluation, we have assigned the following ratings to the alternatives evaluated in the draft EIS.

Alternative	Rating
Alternative 1 No Action/Status Quo	EC-2 (Environmental Concerns-Insufficient Information)
Alternative 2 Larger Trip Limits and Trawl Fleet Reduction	EC-2 (Environmental Concerns-Insufficient Information)
Alternative 3 Larger Trip Limits and Shorter Fishing Season	EC-2 (Environmental Concerns-Insufficient Information)
Alternative 4 Vessel and Sector Catch Caps	EC-2 (Environmental Concerns-Insufficient Information)
Alternative 5 Individual Fishing Quotas and Increased Retention	EC-2 (Environmental Concerns-Insufficient Information)
Alternative 6 No-Take Reserves, Individual Catch Quotas and Full Retention	LO (Lack of Objections)

An overall rating of EC-2 (Environmental Concerns - Insufficient Information) along with a summary of our comments will be published in the *Federal Register*. A copy of the rating system used in conducting our review is enclosed for your reference.

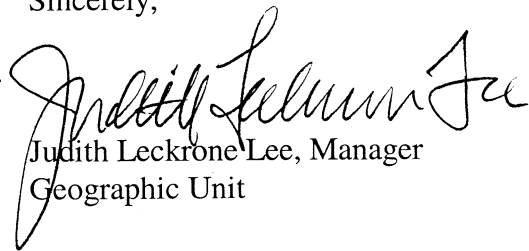
Our concerns with Alternatives 1 through 5 are that while they propose actions that would reduce bycatch, they do not minimize bycatch of all species and the mortality of such bycatch. In addition, Alternatives 1 through 5 do not avoid or minimize adverse effects upon the quality of the environment as required by NEPA regulation.

In addition, as described in the enclosed detailed comments, we recommend that the EIS be revised to address the following topics:

- Observer coverage;
- Actions to address "high grading" and "market limits;"
- Environmental Justice impacts on fishers, processors and consumers.

Thank you for the opportunity to review this draft EIS. If you would like to discuss these issues or need additional information regarding these comments, please contact Mike Letourneau at (206) 553-6382 or myself at (206) 553-6911.

Sincerely,



Judith Leckrone Lee, Manager
Geographic Unit

Enclosure

cc: T. Eaton, EPA-WOO
D. Opalski, EPA-OOO
S. Draheim, EPA-R9

EPA's Detailed Comments
The Pacific Coast Groundfish Fishery Management Plan
Bycatch Mitigation Program
Draft Environmental Impact Statement

Minimizing Bycatch and Mortality of Bycatch

Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) National Standard 9 and Section 303(a)(11) require that bycatch and bycatch mortality be minimized, and standardized reporting methodologies to assess the amount and type of bycatch occurring in the fishery be developed. In addition, the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, require that proposed actions avoid or minimize adverse effects of actions upon the quality of the environment. While all of the alternatives propose actions that would reduce bycatch and bycatch mortality and thereby reduce adverse effects on the environment, Alternative 6 clearly proposes actions that minimize bycatch of all species.

Fish stock data demonstrates that the status quo (Alternative 1) does not adequately minimize bycatch of many species, most importantly, overfished species. Alternatives 2 and 3 would reduce only regulatory discard, that portion of bycatch that results from fishers complying with the regulations. These alternatives do not propose actions to minimize economic bycatch, which according to the EIS, could account for 66% of the discarded bycatch. While Alternatives 4 and 5 reduce all groundfish bycatch, they do not minimize bycatch of other non-groundfish species. In particular, impacts on Pacific halibut, salmon and seabirds would not be minimized.

Alternative 6 proposes actions that would minimize bycatch and mortality to bycatch for all species by employing large area closures, gear restrictions, bycatch caps and increased retention requirements. The trading and consolidation of restricted species catch quotas (RSQ) and individual fishing quotas (IFQ) would reduce the "race for fish." Alternative 6 takes a two pronged approach to reducing bycatch through the use of both a traditional "command-and-control" approach and a "market-base" approach. In addition, Alternative 6 forbids discarding which produces a strong incentive to develop and apply more selective gear because the cost of sorting, storing, transporting and disposing of fish that cannot be sold may be substantial.

Observer Coverage

Monitoring is a fundamental mechanism for accounting for and in turn minimizing bycatch. Requiring 100% observer coverage is the most effective means of accurately accounting for bycatch. Camera monitors onboard ships are a good mechanism for monitoring the retention of bycatch. They do not, however, provide a means of accurately accounting for species composition and weight of bycatch that is discarded. At present, electronic monitoring technology is not accurate enough to identify species and estimate the weight of discarded fish more than 63% of the time. Therefore, we support 100% observer coverage as proposed in Alternatives 5 and 6 until such time that video and electronic monitoring of bycatch equals or exceeds that of the observer program. In addition, we support the proposed quota incentives to those fishers and vessels that accommodate observers, until such time that 100% observer coverage can be provided.

“High Grading” and “Market Limits”

Observer data indicates that 66% of the bycatch was discarded for “market” reasons. The high grading of fish for certain attributes (size, sex or physical condition) in some cases makes them more marketable. High grading occurs when the price differential between high- and low-valued fish is greater than the cost of discarding and replacing the catch and results in increased discarded bycatch. The incentive to high grade is enhanced if the cost to catch additional fish is very low. Related to high grading, processors impose “market limits” to prevent market gluts or to match their processing capacity. A fisher who catches more than their “market limit” may high grade if there is a price differential, or may simply dump the entire excess regardless of size or other factors.

While the EIS proposes various actions for fishers to minimize economic bycatch, it does not propose any such actions for processors. The EIS does not discuss what provisions exist under the Magnuson-Stevens Act that relate to processors for addressing “high grading” and “market limits.” The EIS should evaluate and discuss whether sections of the Magnuson-Stevens Act such as those that address processing capacity and processor permitting, could be employed to minimize economic bycatch.

Environmental Justice

Section 6.2.2 of the EIS states that the alternatives under consideration could affect groundfish allocations or harvest levels that could in turn disproportionately impact low income and minority populations. While the EIS mentions coastal and tribal communities, it does not discern which populations may be disproportionately impacted by the proposed actions. In particular, there is no discussion of the minority (people of color) and low income populations that may be fishers, processors or consumers. In addition, the EIS does not discuss what actions were taken to achieve meaningful participation from those minority and low-income communities that might be disproportionately impacted. The EIS should include the following:

- A comprehensive accounting of all impacts on low income and people of color, including (but not limited to) cumulative and indirect impacts, and impacts to cultural, historic and protected resources. In addition, the EIS needs to demonstrate that the impacts to low income and people of color communities will be disproportionately higher than those on non-low income and non-people of color communities. For such a determination, the EIS must identify a reference community, provide a justification for utilizing this reference community, and include a discussion of the methodology for selecting the reference community.
- The EIS should demonstrate that communities bearing disproportionately high and adverse effects have had meaningful input into the decisions being made about the proposed action. The EIS needs to describe what was done to inform the communities about the proposed action (notices, mailings, fact sheets, briefings, presentations, exhibits, tours, news releases, translations, newsletters, reports, community interviews, surveys, canvassing, telephone hotlines, question and answer sessions, stakeholder meetings, and on scene information), the potential impacts it would have on their communities, what input was received from the communities, and how that input was utilized in the decisions that were made regarding the proposed action.